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Indira Ghandi a/p Mutho v Ketua Polis Negara

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-32–05 OF 2015(A)
RAUS SHARIF PCA, ABDUL HAMID EMBONG, AZAHAR MOHAMED, ZAHARAH IBRAHIM FCJJ AND AZIAH ALI JCA
29 APRIL 2016

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Administrative Law — Remedies — Mandamus — Order of mandamus to compel IGP to execute and enforce two Civil High Court orders — Whether IGP could refuse to command execution of the two orders — Recovery order — Whether existence of two conflicting custodial orders excused IGP from not D *taking any action to enforce recovery order — Committal order — Whether IGP could refuse to command execution of warrant of committal against husband — Whether on grounds of public policy police could not be used to enforce private rights as opposed to public rights*

E Indira Gandhi a/p Mutho ('the appellant') and one Pathmanathan a/l Krishnan ('the husband') contracted a civil marriage under the Law Reform (Marriage & Divorce) Act 1976 ('the LRA'). Out of the said marriage, they had three children. On 11 March 2009, the husband converted to Islam. After the conversion the husband obtained a custody order of the three children from the F Syariah High Court. In the meantime, the appellant applied for and obtained custody of the three children from the Civil High Court. When the custody order was made the elder two children, who were 12 and 11 years old respectively, were with the appellant but the youngest child an 11 month old child, who had been taken away from the appellant without her consent, was G with the husband. Despite the custody order of the Civil High Court, the husband refused to surrender the youngest child to the appellant. Consequently, the appellant applied for and obtained a committal order ordering the husband to be committed to prison until the contempt was purged by the delivery of the youngest child to the appellant. At the same time, H the appellant also obtained a recovery order under s 53 of the Child Act 2001 ('the Act') directing the bailiff and police to search for the youngest child and return her to the appellant. The Inspector General of Police ('the IGP') refused to mandate the execution of the warrant of committal and the recovery order on the grounds that the police force was faced with two conflicting orders, I namely the custody order of the Syariah High Court granting custody to the husband and the custody order of the Civil High Court granting custody to the appellant. The appellant thus applied to the Civil High Court for judicial review under O 53 of the Rules of Court 2012 and seeking, inter alia, an order of mandamus to compel the IGP to execute and enforce the two Civil High

Court orders ('the two orders'), namely the committal order and the recovery order. The High Court judge took the view that the refusal of the IGP to refuse to execute the warrant of committal would be to challenge the authority of an order issued by a superior court and that the declared intention of the IGP not to execute the two orders was tainted with an error of law and unreasonable in the circumstances of the case. The High Court thus allowed the appellant's application for judicial review and issued an order of mandamus to compel the IGP to execute the two orders. The respondent appealed to the Court of Appeal, which held by a majority that no mandamus order should have been issued against the IGP as the matter related to the enforcement of the court processes involving the private rights of the appellant. The appellant had then applied for and obtained the leave of this court to proceed with the present appeal, which was primarily concerned with the issue as to whether the IGP could refuse to command the execution of the two orders.

Held, allowing the appeal in respect of the warrant of committal with no order as to costs:

(1) The issue as to whether the Civil High Court had the power to issue a mandamus order of this nature was not in dispute as such power was provided for by the Courts of Judicature Act 1964 (see para 15).

(2) As for the recovery order, it was an undisputed fact there were two custodial orders, namely the Syariah High Court's order, which granted custody of the children to the husband and the Civil High Court's order, which gave custody of the children to the appellant. In the light of the case of *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* it became apparent that in the existence of two conflicting custodial orders, the High Court judge should not have directed the IGP or his officers to execute the High Court order, irrespective of the Syariah High Court order. On the facts of this case, both the Syariah High Court order and Civil High Court order would bind the IGP and his officers either way and clearly the execution and performance of one order was impossible without being in contempt of the other. As such, on the facts and circumstances of this case, the recovery order should not have been given because the pertinent element under s 52 of the Act had not been fulfilled. No order of mandamus could be issued when such right was doubtful and not free from any reasonable controversy. Consequently, the IGP could be excused for not taking any action to enforce the recovery order (see paras 23–28).

(3) As for the committal order, it was clear that although on grounds of public policy the IGP and the police force could not be used to enforce private rights as opposed to public rights, the private dispute between the two parties had somewhat developed into a challenge to the administration of justice. The husband, despite having exhausted all

avenues to challenge the custody order granted by the High Court, was now willfully disobeying the court's order. The chronology of events in this case also showed that the husband had no respect for the court's order and the administration of justice in this country would be brought into disrepute if the court's order was willfully disobeyed by a party against whom a warrant of committal had been issued after he was found in guilty of contempt of court. As such, the husband should be apprehended to face justice and in order to do so the warrant of committal needed to be executed by the property authority, ie the police. On the facts and circumstances of this case, the IGP could not refuse to command his officers to execute the warrant of committal issued by the Civil High Court. Thus, when the IGP declared his intention not to execute the warrant of committal, an order of mandamus could be issued against him. Hence the case should be remitted to the High Court for the High Court judge to monitor the progress of the execution of the warrant of committal against the husband (see paras 29 & 31–37).

[Bahasa Malaysia summary

Indira Gandhi a/p Mutho ('perayu') dan Pathmanathan a/l Krishnan ('suami') telah memasuki kontrak perkahwinan sivil di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APU'). Daripada perkahwinan tersebut, mereka mempunyai tiga orang anak. Pada 11 Mac 2009, si suami telah memeluk agama Islam. Selepas itu si suami telah memperoleh perintah jagaan ketiga-tiga anak itu dari Mahkamah Tinggi Syariah. Sementara itu, perayu telah memohon untuk dan mendapat hak penjagaan ketiga-tiga anak itu dari Mahkamah Tinggi Sivil. Apabila perintah penjagaan dibuat dua anak yang lebih besar, yang masing-masing berumur 12 dan 11 tahun, berada bersama perayu tetapi anak bongsu berumur 11 bulan itu, yang diambil daripada perayu tanpa persetujuannya, berada dengan si suami. Walaupun terdapat perintah hak penjagaan Mahakmah Tinggi Sivil, si suami enggan menyerahkan anak bongsu itu kepada perayu. Berikutan itu, perayu memohon untuk dan memperoleh perintah komital memerintahkan si suami dimasukkan ke penjara sehingga penghinaan disingkirkan dengan penyerahan anak bongsu itu kepada perayu. Pada masa yang sama, perayu juga telah memperoleh perintah pengembalian di bawah s 53 Akta Kanak-Kanak 2001 ('Akta') mengarahkan bailif dan polis untuk mencari anak bongsu itu dan mengembalikannya kepada perayu. Ketua Inspektor Polis ('KIP') enggan memandatkan pelaksanaan waran komital dan perintah pengembalian itu atas alasan bahawa pihak polis berhadapan dengan dua perintah yang bercanggah, iaitu perintah hak penjagaan Mahkamah Tinggi Syariah yang memberikan hak penjagaan kepada perayu. Perayu oleh itu telah memohon kepada Mahkamah Tinggi Sivil untuk semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah 2012 ('KM') dan memohon, antara lain, perintah mandamus untuk memaksa KIP untuk melaksana dan menguatkuasakan dua perintah Mahkamah Tinggi Sivil ('dua perintah itu'), iaitu perintah komital dan

perintah pengembalian. Hakim Mahkamah Tinggi berpandangan bahawa keengganan KIP untuk menolak pelaksanaan waran komital itu adalah seperti mencabar autoriti perintah yang telah dikeluarkan oleh mahkamah atasan dan bahawa niat yang dinyatakan oleh KIP untuk tidak melaksanakan dua perintah itu dicemari dengan kesilapan undang-undang dan tidak munasabah dalam keadaan kes itu. Mahkamah Tinggi oleh itu membenarkan permohonan perayu untuk semakan kehakiman dan mengeluarkan perintah mandamus untuk memaksa KIP bagi melaksanaan dua perintah itu. Responden telah merayu kepada Mahkamah Rayuan, yang memutuskan dengan majoriti bahawa tiada perintah mandamus yang patut dikeluarkan terhadap KIP kerana perkara itu berkaitan penguatkuasaan proses-proses mahkamah yang melibatkan hak-hak persendirian perayu. Perayu kemudian telah memohon untuk dan memperoleh kebenaran mahkamah ini untuk meneruskan rayuan ini, yang terutamanya berkenaan isu sama ada KIP boleh menolak untuk mengarahkan pelaksanaan dua perintah itu.

Diputuskan, membenarkan rayuan berkaitan waran komital tanpa perintah untuk kos:

(1) Isu sama ada Mahkamah Tinggi Sivil mempunyai kuasa untuk mengeluarkan perintah mandamus bersifat sebegini tidak dipertikaikan kerana kuasa itu diperuntukkan oleh Akta Mahkamah Kehakiman 1964 (lihat perenggan 15).

(2) Berhubung perintah pengembalian, ia satu fakta yang tidak dipertikaikan di mana terdapat dua perintah hak penjagaan Mahkamah Tinggi Syariah, yang memberikan hak penjagaan kanak-kanak itu kepada suami dan perintah Mahkamah Tinggi Sivil, yang memberi hak penjagaan kanak-kanak itu kepada perayu. Berdasarkan kes *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* ia jelas bahawa dengan kewajudan dua perintah penjagaan yang bercanggah, hakim Mahkamah Tinggi tidak patut mengarahkan KIP atau pegawai-pegawainya untuk melaksanakan perintah Mahkamah Tinggi itu, tanpa mengira perintah Mahkamah Tinggi Syariah itu. Berdasarkan fakta kes ini, kedua-dua perintah Mahkamah Tinggi Syariah dan Mahkamah Tinggi Sivil akan mengikat KIP dan pegawai-pegawainya mana-mana cara pun dan jelas pelaksanaan dan pencapaian satu perintah adalah mustahil tanpa menghina yang lain. Oleh itu, berdasarkan keadaan kes ini, perintah pengembalian tidak patut diberikan kerana elemen penting di bawah s 52 Akta tidak dipenuhi. Tiada perintah mandamus boleh dikeluarkan apabila hak itu diragui dan tidak bebas daripada apa-apa kontroversi yang munasabah. Berikutan itu, KIP boleh dikecualikan daripada tidak mengambil apa-apa tindakan untuk menguatkuasakan perintah pengembalian itu (lihat perenggan 23–28).

(3) Berhubung perintah komital, ia jelas bahawa meskipun atas alasan polisi

awam KIP dan pihak polis tidak boleh digunakan untuk menguatkuasakan hak-hak persendirian berbanding dengan hak-hak awam, pertikaian persendirian antara dua pihak-pihak telah membentuk cabaran kepada pentadbiran keadilan. Suami, meskipun telah menggunakan semua peluang untuk mencabar perintah hak penjagaan yang diberikan oleh Mahkamah Tinggi, yang kini dengan sengaja tidak mematuhi perintah mahkamah. Kronologi kejadian dalam kes ini juga menunjukkan bahawa suami tidak menghormati perintah mahkamah dan pentadbiran keadilan dalam negara ini akan dipandang hina jika perintah mahkamah dengan sengaja tidak dipatuhi oleh pihak itu terhadap seseorang yang mana waran komital dikeluarkan selepas dia didapati bersalah menghina mahkamah. Oleh itu, si suami patut ditahan untuk berhadapan dengan keadilan dan bagi tujuan berbuat demikian waran komital perlu dilaksanakan oleh pihak berkuasa hartanah, iaitu polis. Berdasarkan fakta dan keadaan kes ini, KIP tidak boleh menolak untuk mengarahkan pegawai-pegawainya melaksanakan waran komital yang dikeluarkan oleh Mahkamah Tinggi Sivil. Oleh itu, apabila KIP menyatakan niatnya untuk tidak melaksanakan waran komital itu, satu perintah mandamus boleh dikeluarkan terhadapnya. Justeru kes itu tidak patut diremitkan kepada Mahkamah Tinggi untuk hakim Mahkamah Tinggi memantau prestasi pelaksanaan waran komital terhadap si suami itu (lihat perenggan 29 & 31–37).]

Notes

For cases on mandamus, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 975–1008.

Cases referred to

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals [2016] 1 MLJ 585, FC (refd)

Legislation referred to

Child Act 2001 ss 52, 52(2), 53
Courts of Judicature Act 1964 ss 25(2), 78(1), para 1, Schedule
Federal Constitution art 121
Government Proceedings Act 1956 s 33(1)
Law Reform (Marriage and Divorce) Act 1976
Police Act 1967 s 20(3)
Rules of Court 2012 O 53, Form 108

Appeal from: Civil Appeal No A-01–365–09 of 2014 (Court of Appeal, Putrajaya)

Aston Paiva (Kula Segaran with him) (Kula & Assoc) for the appellant.
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Arina Ong Xin Yi watching brief for the Malaysian Bar.
Philip Koh Tong Ngee watching brief for the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Toaism.
Goh Siu Lin watching brief for Women's Aid Organisation (WAO), Association of Woman Lawyers (AWL), Perak Women for Women (PWW), Women's Centre for Change Penang (WCC Penang), Persatuan Kesedaran Komuniti Selangor (EMPOWER), Persatuan Sahabat Wanita Selangor, Sabah Women's Action – Resource Group (SAWO), Tenaganita, Sisters in Islam (SIS), All Women's Action Society (AWAN).

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the majority decision of the Court of Appeal dated 17 December 2014 which allowed the respondent's appeal against the decision of the High Court at Ipoh. The High Court had on 12 September 2014 allowed the appellant's application for judicial review by way of mandamus to compel the Inspector General of Police ('IGP') to execute two High Court orders, namely:

(a) a committal order dated 30 May 2014; and

(b) a recovery order also dated 30 May 2014, given pursuant to s 53 of the Child Act 2001.

[2] Leave to appeal was granted by this court on 22 April 2015 on the following question of law:

> Whether an order of the nature of mandamus, under paragraph 1 of the Schedule to the Courts of Judicature Act 1964, can be directed to the Inspector General of Police to compel the same to comply, and to control and direct the relevant and appropriate police officers to comply with:
>
> (a) A Warrant for Committal (Form 108 of the Rules of Court 2012) where what appears on the face of that warrant is not subject to any question and the warrant has not been cancelled; and
>
> (b) A Recovery Order under the Child Act 2001, where the said order has not been varied, reversed or set aside;

when the Inspector General of Police has demonstrated a refusal to execute or command the execution of the said Warrant for Committal and the Recovery Order.

BACKGROUND FACTS

[3] The appellant and one Pathmanathan a/l Krishnan ('Pathmanathan') were married under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Out of the said marriage, they were blessed with three children, namely Tevi Darshiny, Karan Dinesh and Prasana Diksa.

[4] On 11 March 2009, Pathmanathan converted to Islam. Thereafter, he also converted the children to Islam. At that material time Tevi Darshiny was 12 years old, Karan Dinesh was 11 years old while Prasana Diksa was 11 months old.

[5] After the conversion, Pathmanathan obtained a custody order of the three children from the Syariah High Court at Ipoh. In the meantime, the appellant filed an application in the Civil High Court Ipoh for custody of the three children under the provisions of the LRA.

[6] On 11 March 2010, the Civil High Court granted the appellant custody of the three children. At the time the custody order was made, the two eldest children were with the appellant. However, the youngest child (Prasana Diksa) was with Pathmanathan. Prasana Diksa was taken away by Pathmanathan from the appellant without her consent on 31 March 2009.

[7] Despite the Civil High Court order granting custody of the children to the appellant, Pathmanathan refused to surrender Prasana Diksa to the appellant.

[8] On 30 May 2001, the appellant applied and successfully obtained a committal order, ordering that Pathmanathan be committed to prison until the contempt is purged by delivery of Prasana Diksa to the appellant. A warrant of committal was issued against Pathmanathan. The appellant also, at the same time, obtained a recovery order under s 53 of the Child Act 2001 ('the Child Act') directing the bailiff and the police to search for Prasana Diksa and to retrieve her from whoever is keeping her and to return her to the appellant.

[9] The IGP refused to mandate the execution of the warrant of committal and the recovery order on the ground that the police had been put in a quandary as they were faced with two conflicting orders, namely, the Syariah High Court order granting custody to Pathmanathan and the Civil High Court order granting custody to the appellant. The IGP took the position that to

execute the custody order of the Civil High Court would cause him to be in contempt of the Syariah High Court order.

[10] Consequently, the appellant applied to the Civil High Court at Ipoh for judicial review under O 53 of the Rules of Court 2012 for the following reliefs:

(a) an order of mandamus to compel the IGP to execute and enforce two Civil High Court orders, namely the committal order and the recovery order both given on 30 May 2014; and

(b) an order of prohibition to restrain the IGP from executing and enforcing the Syariah High Court order that concerns the appellant and her three children from the marriage with Pathmanathan.

AT THE HIGH COURT

[11] As indicated earlier, on 12 September 2014, the High Court allowed the appellant's application. An order of mandamus was issued against the IGP to compel the execution of the warrant of committal and the recovery order. The learned High Court judge was of the view that the IGP could not refuse to command the execution of the two orders. According to the learned High Court judge, the refusal by the IGP to execute the warrant of committal which expressly called on the police to apprehend Pathmanathan, the contemnor, and to escort him to prison, and there to be detained and kept in safe custody, would be to challenge the authority of an order issued by a superior court as provided for under art 121 of the Federal Constitution. Thus, the learned High Court judge was of the view that the declared intention of the IGP that he would not execute the two orders was tainted with an error of law and unreasonable in the circumstances of the case. According to him, the IGP's decision could not sustained and a mandamus order, to compel the IGP to execute the two orders, must be issued against the IGP.

AT THE COURT OF APPEAL

[12] The Court of Appeal found that the sole issue for determination was whether the order of mandamus to compel the IGP to execute the two orders was correctly issued and whether the High Court judge had judiciously and properly exercised his discretion in making the order of mandamus against the IGP.

[13] By majority, the Court of Appeal decided in favour of the IGP. In allowing the appeal, the majority was of the view that an order of mandamus could only be issued when there was a public duty imposed in law on a person or body and the purpose of the order was to compel that person or body to carry out the duty required by law to be performed by him or by it. In the

present case, the majority was of the view the order of mandamus against the IGP related to the enforcement of the court processes involving private rights of the appellant. Thus, it was held that it did not come within the scope of public duties of the IGP or the police. Hence, according to the majority, no mandamus could be issued against the IGP to compel him to execute the two orders issued by the learned High Court judge.

[14] The reasoning of the majority judgment stands in sharp contrast to the reasoning of the minority judgment, which basically upheld the reasoning of the learned High Court judge. The minority was of the view that whilst the appellant's case started as a private dispute in a civil matter, the events that followed, causes the case to develop into an issue which related to the administration of justice. Thus, the minority was of the view that the learned High Court judge had not erred in his application of the law and facts in allowing the appellant's application for an order of mandamus against the IGP.

AT THE FEDERAL COURT

[15] The question before us is whether the IGP can refuse to command the execution of the two orders. Before going any further we wish to state that the issue of whether the Civil High Court has the power to issue a mandamus order of this nature is not in dispute. This is rightly so, as such power is provided for by the Courts of Judicature Act 1964 ('the CJA'). First, s 25(2) which provides:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same issue.

[16] Then, para 1 of the Schedule provides:

> Power to issue to any person or authority direction, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[17] The working of s 25(2) of the CJA had been clearly clarified by this court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641. In that case, Petrojasa Sdn Bhd (the respondent) had obtained a monetary judgment at the High Court against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s 33(1) of the Government Proceedings Act 1956 ('the GPA'). The party named in the certificate is the Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an ex parte application for leave for judicial review for an order of mandamus against the Minister of Finance, Government

of Sabah (the appellant) to pay the sum in accordance with the said certificate. Leave was granted. However, the substantive application for judicial review was dismissed by the High Court.

[18] On appeal to the Court of Appeal, the court allowed the appeal by the respondent. The appellant, then obtained leave to appeal to the Federal Court on one issue:

> Given that s 33(3) of the Government Proceeding Act 1956 imposes a statutory obligation on the Government of Sabah to pay according to a certificate issued under s 33(1) of the Government Proceedings Act 1956, the issue is whether judicial review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a certificate issued under s 33(1) of the Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the State Government of Sabah.

[19] Arifin Zakaria FCJ (as he then was) in answering the question above, inter alia, held, after referring to several passages in the judgment of the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at pp 542–545 that:

> [92] From the above, the position of the law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus.

[20] Thus, in that case 'to put right what was plainly wrong in law' an order of mandamus was issued by the court to command the appellant to pay the judgment sum as stated in the certificate.

[21] In the present case, the question now is whether a mandamus order can be issued against the IGP commanding him to execute the two orders of the High Court. Learned counsel for the appellant had urged upon us to affirm the views taken by the learned High Court judge and that of the minority in the Court of Appeal. Learned senior federal counsel on behalf of IGP contended otherwise. She supported the view taken by the majority in the Court of Appeal that no mandamus order can be issued against the IGP as the matter relates to the enforcement of the court processes involving the private rights of the appellant.

[22] As stated earlier, the mandamus order against the IGP was to execute the two orders, namely the warrant of committal and the recovery order. We will first deal with the recovery order.

[23] In dealing with the recovery order we wish to refer to the recent decision of this court in *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585. In that case, the IGP was also confronted with two custodial orders. One was the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the ex-husband. The other was the Civil High Court's order dated 7 April 2014, which gave custody of the children to the ex-wife. However, two days after the custody order was granted in favour of the ex-wife, one of the children, namely Mithran a/l Viran was taken away by the ex-husband. The ex-wife then applied for recovery order before the Civil High Court pursuant to s 53 of the Child Act. The learned High Court judge granted the ex-wife's application. The decision of the High Court was affirmed by the Court of Appeal.

[24] Before this court, one of the questions of law posed was:

> Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made where thereexists a custody order given by the Syariah Court which is enforceable at the same time.

[25] This court answered the above question in the negative. The court was of the view that a recovery order can only be issued in circumstances provided for in s 52 of the Child Act and can only be obtained if the elements in s 53 of the same Act are fulfilled. The elements to be fulfilled are:

(a) the court has reason to believe that a child has been taken or sent away; or

(b) the act is done without the consent of the person who has lawful custody of the child.

[26] It was decided in that case that the phrase 'lawful custody of a child' in s 52(2) of the Child Act includes a person who has been conferred custody by virtue of any written law or by an order of a court including a Syariah Court. Thus in that case, it was held that since there was a custody order by the Syariah High Court giving custody to the ex-husband, the High Court could not possibly issue a recovery order under s 52 of the Child Act. The Civil High Court could not direct the IGP or his officers to execute the recovery order as both the Syariah High Court order and the Civil High Court order bind the IGP and his officers either way and the execution and performance of one order was impossible without being in contempt of the other.

[27] Similarly, in the present case, there are two conflicting custodial orders. One was the Syariah High Court order giving custody of the children to Pathmanathan. The other was the Civil High Court order which gave custody of the children to the appellant. As such, we are of the view that the recovery order should not have been given by the Civil High Court because like the

Viran a/l Nagapan's case the pertinent element under s 52 of the Child Act had not been fulfilled. No order of mandamus can be issued when such right is doubtful and not free from any reasonable controversy (see *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b).

[28] Based on the above, the IGP can be excused for not taking any action to enforce the recovery order. The IGP's quandary over the matter is well founded.

[29] The next issue is whether the IGP can refuse to command the execution of the warrant of committal against Pathmanathan. Before deciding on this issue the following facts need to be highlighted:

(a) on 31 March 2009, Pathmanathan forcibly took Prasana Diksa, then 11 months old, away from the appellant without her consent. The appellant lodged two police reports in respect of the said abduction;

(b) on 11 March 2010, the Civil High Court granted the appellant custody care and control of the children and ordered Pathmanathan to hand over Prasana Diksa to the appellant immediately;

(c) Pathmanathan appealed against the said decision to the Court of Appeal. However, Pathmanathan's appeal was struck out by the Court of Appeal as he had failed to diligently pursue his appeal;

(d) on 27 November 2012, Pathmanathan's application for leave to appeal to the Federal Court against the decision of the Court of Appeal was dismissed;

(e) on 23 September 2013, the appellant commenced the contempt action against Pathmanathan for wilfully refusing to comply with the Civil High Court order, to hand over Prasana Diksa to her. Leave was obtained on 18 October 2013 and the notice of application for an order of committal was filed on the same day;

(f) the committal action was contested by Pathmanathan. His defence was that he had the Syariah High Court order giving custody of the three children to him, and thus, he was duty bound to follow the Syariah High Court custody order;

(g) the learned High Court judge found that Pathmanathan's act of refusing to hand over Prasana Diksa to the appellant was a clear contempt of court. An order was made that Pathmanathan be committed to prison until the contempt was purged by the delivery of Prasana Diksa to the appellant. Accordingly, a warrant of committal was issued against Pathmanathan;

(h) Pathmanathan, thereafter appealed against the decision of the learned High Court judge in finding him guilty for contempt and in issuing the warrant of committal against him; and

(i) on 10 September 2014, the appeal was struck out by the Court of Appeal on the preliminary issue raised by learned counsel for the respondent that Pathmanathan needed to purge his contempt before his appeal could be heard. Further Pathmanathan had again failed to diligently file the relevant papers relating to his appeal. He was out of time to file his memorandum of appeal.

[30] On the above facts and circumstances, the issue is, can the IGP be excused for not commanding his officers to execute the warrant of committal against Pathmanathan? The learned senior federal counsel, as stated earlier took the position that the IGP cannot be compelled with the order of mandamus to execute the warrant of committal as the subject matter before the court has arisen from a private civil dispute between the appellant and Pathmanathan. She further submitted that public policy militates against the use of public resources by the IGP and the police force to enforce the private rights as opposed to public rights especially when the private rights do not affect the public at large.

[31] With respect we disagree. This case does not relate purely to the private right of the appellant and Pathmanathan over the custody of the three children. The private dispute between the two parties had somewhat developed into a challenge to the administration of justice. Pathmanathan, despite having exhausted all avenues to challenge the custody order granted by the Civil High Court, is now wilfully disobeying the court's order. After his application for leave to appeal was rejected by this court, he still refused to hand over Prasana Diksa to the appellant. When the contempt proceeding was instituted against him, he defended his action. When he was found guilty of contempt for disobeying the custody order, he appealed to the Court of Appeal. But when his appeal was struck out, he disappeared together with Prasana Diksa.

[32] The chronology of events in this case showed that Pathmanathan has no respect for the court's order. He had willingly submitted himself to the jurisdiction of the civil court and due process was accorded to him but when the case did not turn out in his favour, he decided to ignore the court's order. We are of the view that this kind of conduct cannot be condoned. The administration of justice will be brought into disrepute if the court's order is wilfully disobeyed by a party against whom a warrant of committal had been issued after he was found guilty of contempt of court.

[33] We are of the view that Pathmanathan must be apprehended to face justice. In order to do so, the warrant of committal needs to be executed and the proper authority to do so has to be the police. The general duties of police officers under the command of the IGP are provided for under s 20(3) of the Police Act 1967 which provides:

> (3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including –
>
> (a) *apprehending all persons whom he is by law authorised to apprehend*;
>
> ...
>
> (f) *executing summonses. subpoenas, warrants, commitments and other process lawfully issued by any competent authority*;
>
> ...
>
> (j) giving assistance in the protection of life and property;
>
> ...
>
> (m) escorting and guarding prisoners and other persons in the custody of the police.
>
> (Emphasis added.)

[34] It can be seen from the above that the duties of a police officer include the execution of warrants. This must include warrants of committal issued resulting from a contempt proceeding. In that light, we are of the view that on the facts and circumstances of this case the IGP cannot refuse to command his officers to execute the warrant of committal issued by the Civil High Court. Thus, when the IGP declared his intention not to execute the said warrant of committal, an order of mandamus can be issued against him.

[35] Therefore, we would answer the question posed to us in the following manner. An order in the nature of mandamus, under para 1 of the Schedule to the Courts of Judicature Act 1964 can be directed to the IGP to compel him to command the execution of the warrant of committal (Form 108 of the Rules of Court 2012) when the IGP has demonstrated a refusal to execute or command the execution of the said warrant of committal. But, for the reasons given earlier, we cannot answer the same with regard to the recovery order issued by the Civil High Court.

[36] In consequence, we allow this appeal. We therefore set aside the decision of the majority in the Court of Appeal. The High Court decision which was affirmed by the minority in the Court of Appeal in issuing a mandamus order

against the IGP to execute the warrant of committal is hereby reinstated. In the circumstances, we make no order as to costs.

[37] We remit this case to the High Court at Ipoh, for the High Court judge there to monitor the progress of the execution of the warrant of committal against Pathmanathan.

[38] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Abdull Hamid Embong FCJ, has since retired.

Appeal in respect of the warrant of committal allowed with no order as to costs.

Reported by Kohila Nesan